IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STANDARD ACCIDENT INSURANCE COMPANY, a corporation,
Appellant,

vs.

EDNA L. HEATFIELD, *Appellee.*

No. 10517

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

HONORABLE L. B. SCHWELLENBACH,
United States District Judge

APPELLANT'S OPENING BRIEF

M. E. MACK,
Attorney for Appellant.

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SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES

Page

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(Continued)

TEXT

STATEMENT AS TO JURISDICTION

OF THE DISTRICT COURT:

The jurisdiction of the District Court rested upon diversity of citizenship, the plaintiff being a citizen of the State of Washington and the defendant a corporation under the laws of the State of Michigan with the amount in controversy exceeding the sum of $3,000.00 all as alleged in Petition for Removal from the Superior Court to the Federal Court, paragraphs 2-3 (Record p. 19-20). Said Petition being granted without objection. Order of Removal (Record p. 22-23) as alleged in Paragraphs I, II, III and V of the complaint and admitted in I and II and the above Petition for Removal.

The statutory provision believed to sustain the jurisdiction of the trial court is Section 24 of the Judicial Code as amended. U. S. Code Ann., Title 28, Sec. 41, (1) (b).

OF THE CIRCUIT COURT OF APPEALS:

The jurisdiction of this court is rested on an appeal from the final decision of the District Court rendered in favor of the plaintiff after a jury trial. (Record p. 240.)

The statutory provision believed to sustain the jurisdiction of this court is Section 128 of the Judicial Code as amended. U. S. Code Ann., Title 28, Sec. 225 (a).

STATEMENT OF THE CASE

That the defendant, The Standard Accident Insurance Company of Detroit, Michigan, a foreign corporation issued to Augustus S. Heatfield a policy of accident insurance in the sum of $7500.00 insuring him against loss from bodily injuries affected directly, exclusively and independently of all other cause through accidental means, subject to all conditions and limitations in said policy contained for loss of life as provided in said policy $7500.00. Indemnity payable to beneficiary who was his wife, Edna L. Heatfield. (Tr. 2-3.)

That on June 30, 1942, insured was driving an automobile on a narrow mountain road. That he was in a ditch off the road at four o'clock p.m. That the insured undertook to get his automobile back on the road and in doing so overexerted himself and placed an unusual strain upon his heart. That he thereafter became violently ill and death resulted between eight p.m. and eight a.m. of the following morning and that it was exclusively and independently of all other causes and not intentionally self-inflicted. (Tr. 3-4.)

That the insurance policy provided that written notice of injury must be given to the company within twenty days after the date of accident or to an

authorized agent of the company with particulars sufficient to identify the insured. Failure to give the notice within the time shall not invalidate the claim if it shall be shown not to be reasonably possible to give such notice and that notice was given as soon as reasonably possible.

That Lamping & Company, a corporation of Seattle, Washington, was the defendant's authorized agent and that notice was given it of the death of said deceased and that claim would probably be made, that an autopsy was held of the deceased. That on July 30, 1942, the plaintiff furnished the defendant at Detroit, Michigan, with an unverified proof of loss.

On August 25, 1942, the plaintiff made a fully sworn proof of loss which was forwarded to Lamping & Company at Seattle, Washington. That the defendant has failed to pay the indemnity and more than sixty days have elapsed. That the plaintiff has done all things required by policy of insurance to be done and prays judgment for $7500.00 with costs and disbursements. (Tr. 6-7.)

Attached to the complaint is Exhibits A, B and C. (Tr. 8-9-12.)

The defendant filed a motion to dismiss the main ground of which was that the complaint does not state

facts sufficient to constitute a case of action. (Tr. 13.)

The action was removed to the District Court of the United States, to the Eastern District of Washington and came on for hearing and trial in said court. (Tr. 14-24.)

The defendant's motion to dismiss was overruled. (Tr. 25.)

The defendant answered denying Paragraph 4 and 5 that the insured was driven off the road, that the insured undertook to get his automobile back on the road and in doing so, overexerted himself and placed an unusual strain on his heart, that he became violently ill and death resulted between eight p.m. and eight a.m. and that his death was approximately, exclusively and independently of all other causes by said overexertion and strain.

The defendant admitted the requirements of the policy in the complaint D4, E5 and G7. (Tr. 5.)

Further answering the defendant denies that the plaintiff has done all things which the insurance policy require to be done by her and as a complete an affirmative defense alleged that the said policy contained the following provision S. Full compliance of the insured and beneficiary with all the provisions of this policy is a condition precedent to recovery

hereunder and any failure in this respect shall forfeit to the company all rights to any indemnity. That the plaintiff or any one in her behalf totally failed to comply with Paragraph D4 or E5 or either of them. (Tr. 31.)

That no notice was given within the twenty days or at all. Denied that the plaintiff came to his death by accidental death or bodily injury affected directly, exclusively and independently of all other causes and that no notice was given as provided by provision of the policy D4 or G7 or E5 within the twenty days, that there is no allegation in the plaintiff's complaint that the plaintiff came to his death through accidental means. That the plaintiff or any one in her behalf furnished to the defendant proof of loss within ninety days from June 30, 1942, as required by G7. (Tr. 32-33.)

The defendant prayed that the plaintiff's complaint be dismissed. The plaintiff replied admitting Paragraph of the policy S denying the allegations contained in Paragraph Two of the first affirmative defense admitting as to Paragraph Three that it is a policy payable in the event of accidental death or bodily injury affecting directly, exclusively and independently through all other means and further alleging that although the plaintiff knew on July 8, 1942, that the insured had an accident policy and

that an effort had been made to find the policy, it was not until August 11 that the policy was found and until that date the plaintiff did not know the requirements thereof and denies that there is no allegation in the complaint that the insured came to his death through accidental means. That he denies in the reply the third affirmative defense. (Tr. 34-36.)

The case came on for trial by a jury and it found for the plaintiff. Ralph Harrington called as a witness testified that as he came around a curve he saw a car, one wheel was clear off the shoulder of the road and back wheels, one was down over the shoulder and the other in the soft shoulder. The man there who was deceased, stepped out from behind his car to stop him. He looked tired, fagged out and seemed worried. He was alone. The car off the road was there to stay without help. I saw a shovel there in the back of the car. (Tr. 49-53, Cross-Examination.)

> "I never saw him doing anything at all. When I got out I looked it over to see what shape it was in and took the rock out so it wouldn't tear the fender and running board out. I got close enough to talk to him. We were there probably twenty minutes. Oh, I don't know how the rock got there. The road was over sixteen feet wide. He couldn't get out without help; he had to be pulled out. It was a quarter past six. I attached my front bumper to his front bumper. I started my motor and he started his, and backed him out.

He guided his car and after I got him on the road, I went on. About two miles away was a forest camp. I looked over the situation, no man could ever get that automobile out.

Q. You looked at the ground and all you noticed was that particular rock in front?

A. Yes, and a big limb. It was a pole.

Q. That was also under the automobile?

A. Down by the wheel where it could have torn the fender off.

Q. Did you see him doing any digging?

A. No, that was done when I got there. (Tr. 53-65.)

Floy Harrington said we reached the place at 6:15. It was a hot day and he was hot and tired, really exhausted. He had his hands on his abdomen.

Q. Tell what he said?

A. Well, as I said, he was holding his hands sort of like this about the abdomen and he said, 'I have an awful pain. I have a pain in my heart; the first time in my life I ever had trouble with my heart.' He said it was so hot and he got tired and exhausted, he had to lie down. (Tr. 65-70.)

A. He said he had been there two hours. He said he lay down an hour.

A. And it was real hot.

Q. So that we understand each other—he said he had attempted to move the car forward and move it back?

A. Yes, he had started the motor up and tried to get it up on its own power.

Q. That is about all you recall that Mr. Heatfield did?

A. Yes, as to his condition and what he had been doing.

Q. If he was breathing pretty heavily, you would have seen it?

A. Oh yes, if he was panting, I would have noticed it." (Tr. 71-75.)

Plaintiff at this point offered in evidence the policy of insurance marked "Plaintiff's Exhibit B," which was admitted. (Tr. 76.)

"Mr. Morey: May the record show that the plaintiff's Exhibit C is the document marked Exhibit A in the interrogatories which will be subsequently introduced.

Mr. Mack: We object to this Exhibit C for the reason it totally fails to serve any purpose in the case whatever. It is incompetent, irrelevant and immaterial and proves no statement in the case whatsoever.

The Court: I don't care to hear further argument. The objection is overruled and the exhibit is admitted. As I understand it, Exhibit C is also the same as Exhibit A attached to the complaint?

Mr. Morey: Yes, Your Honor.

Mr. Mack: After Exhibit C was read in evidence, the defendant moved to strike Exhibit C for the reason urged to the introduction thereof.

The Court: Motion denied."

Plaintiff offered in evidence Exhibit D being the letter dated June 30, 1942, which is the original of

plaintiff's Exhibit B attached to the interrogatories and also Exhibit B attached to the complaint. He offered that in evidence.

> "Mr. Mack: I object to that as incompetent, irrelevant and immaterial and sustains nothing in the complaint.
>
> This is dated July 30; it is not sworn to. I am at a loss to understand it. He contends it is a notice of some kind. It is clearly too late for the ordinary notice. If he contends it is proof of loss, it does not comply with the requirements. It is just a statement in a letter dated July 30 and it could not in any event be proof of anything in this case. I do not know what its purpose is.
>
> The Court: Objection overruled. It will be admitted."

After the introduction of Exhibit D the defendant moved to strike it for the reason as a self-serving declaration. (Tr. 76-81.) Overruled.

Thomas A. Callam was sworn and testified for the plaintiff. He lives at Boyds, Washington, and he was working on June 30, 1942, at a forest camp between Curlew and Kettle Falls. "A gentleman came to our camp on June 30, 1942. He was sick and he tried to vomit."

> "Q. Did this man say anything to you about any work he had done down on the road?
>
> Defendant: I object to this as irrelevant and immaterial, self-serving declaration, hearsay and

not a statement of fact and not a part of the Res Gestae.

The Court: Objection overruled.

A. Yes, he said he had overexerted himself.

Mr. Mack: I move to strike that as a conclusion of Mr. Heatfield and not a statement of fact.

The Court: Overruled. Motion denied." (Tr. 109.)

Thomas Heatfield testified for the plaintiff as follows:

"His father was Augustus S. Heatfield and a representative of the Hanover Fire Insurance Company. His work consisted of supervising local agents. I saw him last January 19, 1942, and he seemed normal. He was 65 years of age, and the same date and same age when he died.

Q. Did you have an opportunity to observe along the road at about the spot where there were automobile tracks that went off the road?

Mr. Mack: To which I object as irrelevant, incompetent and immaterial unless it is shown that it has some connection with the case.

The Court: I will sustain the objection until such time as you can connect it up with the place. (Tr. 89.)

The Court: You are objecting to the introduction of this testimony?

Mr. Mack: Yes, sir.

The Court: I will overrule the objection. It is a question for the jury as to the effectiveness of this notice. They will be instructed with reference to it.

Mr. Mack: I object to that. It is simply the view of the witness and not a statement of fact.

The Court: Objection sustained. Let the records show the defendant objects to all of this testimony by Mr. Heatfield. Your general objection will go to all of this testimony and is admitted over your objection.

There were distinct marks there where a car had been in the ditch.

The Court: I will instruct the jury to disregard the last part in so far as the witness said where the car had regained the road. They are on the south side of the road.

Mr. Mack: I definitely object to that as incompetent, irrelevant and immaterial.

The Court: I sustain the objection.

Q. The tracks very definitely show they were deeply imbedded in the loose earth. (Tr. 112.)

There were two sets of tracks. One was leading off the shoulder, the second set overlapping these was leading back to the road. I took five photographs that show clearly the marks made in the loose earth.

Mr. Mack: I object to it as incompetent, irrelevant and immaterial, not properly identified, not showing where it was taken, without reference to any condition apparent in this case.

The Court: The photo exhibit G is admitted in evidence. That portion of the answer of the witness which reads: 'The car was taken back to the shoulder of the road,' will be stricken. Picture will show for itself."

Plaintiff offers in evidence Exhibit H.

"Mr. Mack: I make same objection as to exhibit G.

The Court: Objection overruled."

"The Court: It will be admitted subject to the same objections and the same ruling."

Plaintiff hands Witness Heatfield Exhibit D, marked J.

"Mr. Mack: To which I make the same objection as to H, I, and J.

The Court: The same ruling.

My father carried a shovel in the car."

Plaintiff now offers in evidence Exhibit K, to which defendant objects.

"The Court: Subject to the same ruling. It will be admitted. (Cross examination.)

I drove all the way from Orient to Curlew, 22 to 24 miles. I contacted Don Abrahams after I had gone approximately half way, and I knew approximately from what he said where the accident occurred. He wrote nothing down. I located the place in my mind. I never saw the road before. I had not located the place when I met Mr. Abrahams. He was going west toward Curlew and I had traveled half the distance. Mr. Abrahams never saw my father where he was in the ditch." (R. 177.)

Dr. W. N. Myhre testified for the plaintiff. No objection was made as to his qualifications.

"I attended the autopsy on the body of Mr. Heatfield in Spokane.

Q. Was there anything, Dr. Myhre, in that post-mortem examination which in any way by

itself indicated what had caused Mr. Heatfield to die?

A. Yes, I think there was.

Q. What would you say that was?

A. There was evidence of coronary arterosclerosis.

Q. I suggest first you use the medical or technical term, and then explain that to us.

Q. The heart muscle is called—

Q. In other words, the thing that brings on this stenosis is overexertion.

Mr. Mack: I object to that as calling for a conclusion.

The Court: The objection is overruled.

A. Exertion will not bring on coronary stenosis.

Q. I want you to explain to me—you used the words 'coronary stenosis.'

A. Yes, sir.

Q. How did you use that in connection with this mio-cardial insufficiency?

A. Coronary stenosis is what you might term the normal aging process in the walls of any vessel—it's the normal aging process of all body blood vessels—it occurs earlier in some people than in others. Coronary stenosis, as I used it in Mr. Heatfield's case, was the narrowing of all blood vessels or, in particular, narrowing to such extent it was practically incapable of furnishing the nourishment to this heart muscle.

The Court: Q. You say stenosis is not brought on by exertion. What about the insufficiency?

A. The insufficiency is brought on by a demand which is greater than the nourishment from the stenosic vessel, or that the vessel will supply. The muscle then becomes insufficient when it is not supplied with enough gasoline to carry it up the hill; insufficient for the task placed upon it." (R. 124-5.)

CROSS EXAMIANTION.

By Mr. Mack.

"Q. Stenosis, as I understand it then, is the thing itself which causes the blood to flow less freely through the artery.

A. That is correct.

Q. That is not brought on by exertion.

A. It is not.

Q. The stenosis then, apparently, is merely the fact the sclerosis narrows the artery.

A. Stenosis is the same thing that happens in hot water pipes—there is a lime deposit—it doesn't occur suddenly.

Q. When stenosis becomes complete—

A. Then we have coronary occlusion.

Q. Which is the stoppage of all blood.

A. That's right.

Q. Supposing you don't know how much work and labor the man had done, could you say whether or not he overexercised, overexerted himself—is it possible to tell from that?

A. To tell he had overexerted from what we found in the dead body?

Q. Yes.

A. I would say it would be very difficult to tell what caused the thing by looking at the autopsy.

Q. Then the answer would be: No, you couldn't tell. (R. 131.)

A. That's right."

Dr. George Snyder testified for the plaintiff, as follows, after qualifying, he said:

"Q. Did this coronary sclerosis, did that have anything to do with that man's death?

Mr. Heatfield had hardening of the arteries.

Q. Doctor, considering the fact that Mr. Heatfield was sixty-five years of age, that he was an office man, traveling salesman, and that he had this condition you have described you found in his body, and that he was not accustomed to hard manual labor, and that he did not know he had any heart trouble, and that man, on a date, June 30th, 1942, in the morning and afternoon was the same as he always had been, apparently in good physical condition to all intents and purposes, seemed to feel all right, about three o'clock that afternoon he seemed to be in that condition, about six o'clock he was found with his car off the road, a mountainous country road, isolated spot, car in such condition it can't be moved without being towed, this Mr. Heatfield was tired and said that he had been working on his car for about two hours, and worked so hard he had to lie down and rest, and had for the first time in his life heart pains about his heart; then, further assuming that that was about 6:15 and about 6:30 other witnesses saw him and he was vomiting, stooped over, and when this first witness saw him he was holding his hand down on the front part of his body, and the second witness, with a third witness,

helped put him on a bed that night, and while he was there he told this witness he had been working hard on his car, overstrained himself, overexerted himself, and he was found dead the next morning—do you have an opinion as to what caused his death? Answer that 'yes' or 'no.'

Mr. Mack: I object to that as incompetent, irrelevant and immaterial, assuming facts not proven, not showing that the man was vomiting, no showing he had been working two hours—no statement he had overexerted himself, it's not in accordance with the facts so far proven in this case.

The Court: Then I will overrule the objection.

Q. Now what, in your opinion, caused his death?

A. In my opinion, it was due to physiological disturbances of his heart, functional disturbances in the action of his heart.

Q. What caused that?

A. In the first place, this man had a narrowing of the coronary artery due to a hardening process. In a second place, there was a hemorrhage or bleeding about the upper end of the aorta and these things, this coronary artery narrowing and the hemorrhages around the upper end of the aorta *probably* resulted in a spasm of the coronary arteries. In other words, amounting to closing them up so far as supplying the heart muscle and because of that the heart ceased to function normally and the man died.

Q. What started the spasm?

A. It's entirely probable the hemorrhage around the upper end of the aorta did that.

Q. What caused that; did it just happen to him?

A. No, I think not, because there was a break in the intima of the aorta and these breaks are usually due to some sudden strain coming on the vessel.

Q. That's what I want to find out, whether you think the strain had anything to do with it.

A. Yes, I think it did."

CROSS EXAMINATION.

By Mr. Mack:

"I observed hardening of the arteries. I would say there was moderate severity but there was some narrowing of the coronary artery, especially the left, and a narrowing of the vessel in the brain. Angina pectoris is a train of symptoms. It is usually due to a spasm of the artery that supplies the heart muscle.

Q. Wouldn't it take a great deal of strain to effect a hemorrhage?

A. Not in an aorta that is weakened by disease.

Q. Was this weakened by disease and what kind of disease?

A. Arterio-sclerosis, hardening of the arteries.

Q. Was there any hardening in the aorta?

A. Yes, the aorta was involved. Yes.

Q. Was there sclerosis in there?

A. Yes.

Q. To what extent?

A. I would say moderately severe." (R. 149.)

Edna L. Heatfield testified as follows:

"I am the plaintiff in this suit. We have been

married forty years. He was state agent for the Hanover Fire Insurance Company for twenty-six years. He appoints agents. He did the office work in connection with that position. He traveled in his car. His work was not manual labor. He was of a husky build and engaged in no hard manual labor. I never saw him do any such. He looked young for a man of his age and appeared healthy. I did not know he had any heart trouble. He was very high strung and excitable. I was advised of his death at 11 o'clock of July 1, 1942, and I received his personal effects from Smith & Co., undertakers. I received a white Arrow shirt. It was stained and yellow at the shoulders. His collar was wilted and it looked like perspiration. Mr. Selbach advised me in August when he found the policy. I don't remember the date. My son looked through Mr. Heatfield's effects at the office. He found a policy in his vault at the Paulsen Building and I never received proof of loss forms from the defendant." (R. 155.)

CROSS EXAMINATION.

By Mr. Mack:

"I don't remember the date I received Mr. Heatfield's clothes from Smith & Company. I said his shirt was stained as if with perspiration around the collar and the neck down to the shoulder. It was a hot day, June 30, 1942. I don't think my son found any policies. I only made a search of my husband's desk. We found some accident policies besides this one in question. The policies were brought to me at the house. There were two accident policies. I don't know where they were. Mr. Heatfield was high strung and rather excitable when anything unusual went wrong. He never complained of heart trouble to me." (R. 159.)

Dr. Peter Reid testified for the defendant:

"I am a physician and surgeon and reside in Spokane. I have been practicing 35 or 36 years. (Here the Doctor's qualifications were admitted.) I was present at the autopsy and got a report thereof.

Q. From the autopsy itself, was there anything to determine the cause of the death of Mr. Heatfield?

A. Yes. His death was caused by angina pectoris, a heart condition which will cause death. Mr. Heatfield's coronary arteries had become hardened, particularly in the left artery, which reduced it one-half of what it ordinarily would be. If the heart is speeded up, not sufficient blood goes through. As a result, it ends in a spasm of the heart muscle and people will die from that condition.

This is a type of case that die at night. When we got there, he was dead. Mr. Heatfield has a pathology to produce that identical condition and that is the reason I base my opinion on the fact he died of an attack of angina pectoris. It would be a continued state of angina and that means a terrific severe pain in the chest.

Q. From what you saw there, what is the fact, please, as to whether considerable exercise or any exercise affected the condition or caused death in this instance?

A. Well, if exercise would influence it at all, the exercise would bring on the attack of angina at the time of the exercise when the need of more blood and more oxygen was necessary in the heart muscle. If exercise were responsible for the cause of angina pectoris, it would come on at the time of exercise and not afterward. If the angina was brought on by the exercise, then it would be con-

tinuous from the time the attack came on following the exercise until death resulted.

Q. Assuming a man sixty-five years of age, such as Mr. Heatfield was, and that he had never had any, never done any hard labor, that his business was merely that of traveling solicitor, that he didn't know he had any condition—no difficulty with his heart—that his health had been reasonably good—very good—and that on the afternoon of the 30th day of June, 1942, he found himself off the road in an automobile which he was unable to move, couldn't be moved by himself, and that he then told a lady he had started his engine after he was in that predicament and tried to back his car up and run it forward, that he laid down there an hour, that it was a reasonably hot day, and that about 6:15 another automobile came in the opposite direction and he went out on the highway and motioned to them by waving his hand to stop them, and did stop them, and they pulled him out; that he looked tired and worn out and that he then went a distance of two or two and one-half miles and stopped to get a drink of water, and was asked if he wanted anything he said he didn't think he needed anything, he took the drink of water and walked back to his car, which was a hundred yards, approximately, from the scene where he got the drink of water, and then half an hour afterward he screamed, and they went to him and brought him back to the camp, put him to bed with all his clothes on, other than his shoes and his coat, talked to him until about 10 or 10:30 in the evening, and after that he was found sometime later than that—dead—would the exercise I have related—oh, I forgot one feature of it—he said to this man at the camp that he had overexerted himself, would what I have related have anything to do with his dying later in the evening?

A. In my opinion, no.

Q. If it did have anything to do with his condition, Doctor, when would his death have occurred?

A. His attack would have come on when the need was greatest on the heart, and would have continued. He might have died afterwards, but there would be symptoms of his attack of angina until his death, without any period in between of comparative comfort.

Q. In your opinion, Doctor, from the examination, the autopsy and what I have related, the exercise took no part in it whatever?

A. That is my opinion.

Q. And if exercise brought on any condition of lack of blood coming into the heart it would be at the time of the exercise?

A. The time when he required more blood in the heart.

Q. Would the fact there was a slight hemorrhage of the aorta aid in causing this man's death?

A. I don't see how it possibly could.

Q. So, in your opinion, his death was due to—

A. Angina pectoris."

DIRECT EXAMINATION.

Dr. D. H. Lewis testified for the plaintiff as follows:

Q. "From the autopsy itself, was there anything to show what was the cause of the death of Mr. Heatfield?

A. The definite cause of death, no; no one could tell.

Q. What, in your opinion, did cause the death from what you saw there at the autopsy?

A. He died from natural, senile causes. In other words, the body just gradually broke down.

Q. Did the condition of the aorta itself disclose any other condition showing the aorta might have caused his death?

A. No, sir.

Q. Would the fact that he died after 10:30 in the evening—would the fact he had been exercising to the extent of overexertion, or looked tired and worn out, have anything to do with his death?

A. You couldn't call that a cause of death, no.

Q. Can you give us a name in your opinion—what, in your opinion, he died of?

A. Well, most probably the thing he died of was angina pectoris. Now that's a hard thing to prove. I couldn't definitely state he did or did not.

A. Will you tell us what is meant by mio-cardial?

A. Mio-cardial of the heart muscle is a degeneration of the muscle of the heart. It has nothing to do with blood supply.

Q. Now, with reference to angina pectoris, do people die in their sleep of that?

A. Let me explain angina pectoris in my way. Angina pectories is a spasm of the heart muscle. Now, the heart beats rhythmically, it contracts and expands, and so forth. Now, if that contraction becomes a spasm and doesn't allow the heart to expand, shuts off all the oxygen to come to that particular blood stream and they die in a very few seconds.

Q. Does it come on them when they are asleep occasionally?

A. Yes, sir.

Q. In this particular autopsy and the outline I have just given to you, in your opinion, did the exercise have a thing to do with this man's departing from this life?

A. I don't think anything more to do with it than a full meal or a strained bowel movement would have to do with it."

DEFENDANT RESTS.

PLAINTIFF RESTS.

"Mr. Mack: Comes now the defendant in the above-entitled action and moves the Court to dismiss the same and to render a verdict for the defendant for the following reasons:

First: That no notice of any claim for accident was given by the plaintiff within the twenty days required by the policy, it definitely providing that notice thereof shall be given within the twenty days.

Second: There is no evidence or inference from the evidence that Augustus S. Heatfield had overexercised, overexerted or in any manner strained himself whatsoever.

Third: That there is no evidence of death in this case whatsoever by accidental means, or that the same was violent or exclusive of ordinary death.

That the evidence totally fails to establish the cause of death of Mr. Heatfield in so far as the plaintiff's case is concerned.

That the only evidence in this case as to any accidental means is based upon the admission by

this Court of the testimony being on the theory that it is a part of the res gestae, and to be a part of the res gestae it is obligatory that the proof be made by statements of fact and not statements of conclusions, and under the entire record up to this point, the plaintiff is not entitled to recover.

Whereupon: After argument on the above motion to the Court, the motion was, by the Court, denied and exception allowed."

SPECIFICATION OF ERRORS.

1. Error in denying defendant's motion for nonsuit and dismissal at the close of plaintiff's case.

2. Error in denying defendant's motion for a directed verdict at the close of all the evidence.

3. Error in denying defendant's motion to set aside the verdict and judgment for plaintiff, and to enter judgment for the defendant.

4. The Court erred in denying appellant's motion for a new trial.

5. The Court erred in admitting in evidence plaintiff's exhibit C over the defendant's objection.

"Mr. Mack: We object to this for the reason it totally fails to serve any purpose in the case whatsoever. It is incompetent, irrelevant and immaterial and proves no fact or statement or allegation of plaintiff's complaint whatsoever.

The Court: The objection is overruled, and exhibit C is admitted."

EXHIBIT C (R. 77)

"July 8, 1942.

Lamping & Company,
250 Colman Building,
Seattle, Washington.

Gentlemen:

In re. Augustus S. Heatfield, Standard Accident policy No. 97R1387; renewal number, 706997.

Assured died near Curlew, Washington, on June 30th. I am attorney for the estate. He held an accident policy with the Illinois Commercial Men's Association and the Aetna Life, carrying double indemnity. I was employed by the executor and the widow, to represent them in the handling of the estate and also in the matter of collecting on the accident policies. That employment was made on July 1st. It was not until today that I learned Mr. Heatfield had a policy with the Standard Accident Insurance Company as above numbered, therefore, I must advise you that there will probably be a claim made for payment under your accident policy.

The body is being held intact for an autopsy which I intended to have performed on July 10th, until I knew he had this policy with you. If you desire to have an autopsy made or to be represented when the autopsy is taken, and if you cannot make arrangements by July 10th, I think we can hold the body for a day or two longer. In any event, this is your notice that you may have an opportunity to have the autopsy if you desire. I wish you would advise me.

Very truly yours,

Harry M. Morey."

6. The Court erred in admitting exhibit D over defendant's objection.

"Mr. Mack: I object to that as incompetent, irrelevant and immaterial and sustains no allegation of the complaint. This is dated July 30th. It is not sworn to. I am at a loss to understand it. He contends it is a notice of some kind. It is clearly too late for the ordinary notice. If he contends it is a proof of loss, it does not comply with the requirements. It is just a statement in a letter dated July 30th and it could not in any event be any proof of anything in this case. I don't know what the purpose of it is.

The Court: The objection is overruled, it will be admitted. And the jury is instructed with reference to this exhibit, and the last exhibit that was admitted in evidence not as proof of what they say—they are statements made by Mr. Morey and are admitted under the provisions of the policy requiring certain notice to be given and you will consider them for that purpose only. The mere fact that certain statements made in there is not proof the statements are true of the way in which the thing occurred, but are admissible as notice only, and not as proof of facts alleged." (R. 78.)

EXHIBIT D.

"July 30, 1942.

Standard Accident Insurance Company,
Detroit, Michigan.
Gentlemen:

Re: Accident policy of Augustus S. Heatfield, 97R1387.

I represent Thomas A. Heatfield, executor of the estate of Augustus S. Heatfield, and his widow.

Augustus S. Heatfield died near Curlew, Washington, on June 30th, 1942. It seemed that he was driving his automobile on a mountain road be-

tween Curlew and Colville, Washington. An automobile approaching from the opposite direction crowded him off the road so that the right wheels of his car were down over the bank. Mr. Heatfield was alone at the time of the incident and immediately attempted to get his car back on the road. In so doing he greatly overexerted and strained himself. Finally another motorist towed or pulled his car down the road and Heatfield then drove to a forest ranger camp, where he got out of the car to get some water. Later the attendants at the camp heard a call for help and found Heatfield stretched out on the ground near his car. They took him into camp and put him to bed and the next morning it was discovered he had died.

It is the contention of the executor and widow that the above incidents establish a claim in accordance with the provisions of the above-described policy, and claim is hereby made on you for payment of $7500, face value of the policy. On July 8, 1943, I wrote Lamping & Company in Seattle, advising them that Heatfield had died and that claim would probably be made under the policy and that we intended to have an autopsy and giving an opportunity to the company to have an autopsy or to be present at the one we were making. Autopsy was held on July 10, 1942. Dr. Peter Reid attended the autopsy in your behalf. There were four persons interested in the making of the autopsy, the widow, the Illinois Commercial Men's Association, the Aetna Insurance Company and your company. The pathologist's fee was $50. I had an agreement with the Aetna and the Illinois Commercial Men's Association that the Pathologist's fee would be divided between us and just before the autopsy was performed I was informed Mr. M. E. Mack was representing your company. Mr. Mack had no definite authority from you but he indicated

that the Standard Accident Insurance Co. would pay its share of the Pathologist's fee. Therefore, at the proper time, I will ask you to reimburse me in the sum of $12.50.

Will you please forward such proof of loss forms as you may require?

Very truly yours,

(R. 79-81.) Harry M. Morey."

7. The Court erred in admitting the following testimony of Thomas A. Heatfield over defendant's objection.

R. 88-89 Thomas Heatfield testified as follows:

"His father had died on June 30, 1942. On July 3, 1942, he drove over the Curlew-Orient Highway, a distance of 22-24 miles, never having been there before.

Q. And did you have an opportunity to observe a place along the road at about the spot where there were automobile tracks that went off the road?

Mr. Mack: To which I object as incompetent, irrevelant and immaterial unless it is shown it has some connection with this particular automobile. If he found tracks there on a road eleven miles long, it doesn't prove a thing.

The Court: I will sustain the objection until such time as you can connect it up with the place. (R. 89.)

The Court: I will overrule the objection." (R. 111.)

Whereupon; the same interrogatory was asked and the answer was: Yes. (R. 111.)

8. The Court erred in submitting the case to the jury whatsoever; there being no proof of the death of Augustus S. Heatfield by accidental or bodily injury caused directly, exclusively and independently of all other causes through accidental means.

The Court instructed the jury:

> "Whether or not the notice was a proper notice is purely a question of law and I decided that question. I decided it was a proper notice and proof of loss had been furnished in this case, so far as the affirmative matter contained in the answer and so far as the reply is concerned you need not bother yourselves with them. They simply raised issues of law which have been decided in favor of the plaintiff by me." (R. 223.)

9. Error in trial court's holding that notice was given as provided by the policy sued upon within 20 days; such defense being set out in the answer, and no waiver of said notice being plead.

10. Error in admitting the testimony of Thomas A. Heatfield, son of the deceased, as to the condition of the locality where the deceased left the road. Said witness not having been there whatsoever until three days after the occurrence, and no one that ever was there having directed him thereto, and no land mark or object or anything pointed as to the place; his finding being purely based upon nothing but imagination.

11. The Court erred in admitting the testimony over defendant's objection of Floy Harrington and Thomas Callam; said testimony not being a part of the res gestae.

Floy Harrington testified that:

"Mr. Heatfield had been there two hours and that he had laid down an hour and it was a hot day. (R. 72.)

Q. You were talking to this man?

A. Yes.

Q. Tell us what he said?

Mr. Mack: I object to that, if Your Honor please, as incompetent, irrelevant, immaterial, self-serving and hearsay.

The Court: Is it part of the res gestae? That is the question.

Mr. Mack: It is not part of the res gestae.

The Court: Other than the fact as to how he was pushed off the road by some woman driver, she can testify to all other matters. The other portion is admissible under the res gestae and under the rule permitting a witness to testify as to the statements made by a deceased person as to his physical suffering. (R. 67.) You may ask the witness the question as to what he said to the witness.

Q. Tell what he said?

A. Well, as I said, he was holding his hands sort of like that and he said: 'I have an awful pain. I have a pain in my heart, the first time in my life I ever had trouble with my heart.' He said it was so hot and he got so tired and

exhausted he had to lie down. He said he had been there an hour and I asked him if he tried to get his car out.

Mr. Mack: I object to what he said. It is not part of the res gestae.

The Court: Objection overruled.

A. And he said yes. He had tried to back up and tried to go forward and he couldn't go either way. He tried to get it out and he couldn't by himself. (R. 71.) And he said he had been there two hours. He said he had laid down an hour. Yes, it was real hot. Yes, he had started the motor up and tried to get it up on its own power." (R. 74.)

Thomas Callam testified:

"Q. Did this man say anything to you about any work he had done down on the road?

Mr. Mack: I object to that as incompetent, irrelevant and immaterial, a self-serving declaration, hearsay and not having been established as a part of the res gestae and not a statement of fact.

The Court: Objection overruled.

A. He said he had overexerted himself.

Mr. Mack: I move to strike that as a conclusion and not a statement of fact.

The Court: Motion denied."

12. The Court erred in admitting the testimony of Drs. Myhre and Snyder; there being no foundation upon which it could be legally based or admitted.

13. The Court erred in denying the appellants

motion to dismiss the action, based on the motion to dismiss. The allegations of the complaint being wholly insufficient to establish the death of Augustus S. Heatfield by accidental means, effected directly, exclusively and independently of all other causes by accidental means.

Defendant filed motion to dismiss on the ground that the complaint does not state facts sufficient to constitue a cause of action. (R. 13.)

The Court in his order considered the demurrer as a motion to dismiss and ordered said motion for dismissal and the same is hereby denied. (R. 25.)

SUMMARY OF ARGUMENT

1. The action should have been withdrawn from the jury and judgment entered for the appellant. (Specifications of Error 1, 2, 3 and 4.)

(a) There was a total failure of giving any notice as provided by Paragraph D4 of the policy as follows:

> "Written notice of injury on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury." (R. 5.)

(b) If E5 ever came into play, there was a total failure of proof of any showing it was not, reasonably possible to give the notice required in D4. It

was not shown that a notice was given as soon as reasonably possible, the burden of proof being on the beneficiary. E5 reading as follows:

> "Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the Company at Detroit, Michigan, or to any authorized agent of the Company, with particulars sufficient to identify the insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible." (R. 5.)

(c) There was no notice as required in E5, it was "with particulars sufficient to identify the insured." This was totally ignored. No identification of insured except his name. Paragraph S of policy reads as follows:

> "S. Full compliance of the insured and beneficiary with all provisions of this policy is a condition precedent to recovery hereunder and any failure in this respect shall forfeit to the Company all right to any indemnity."

Hanley vs. Occidental Life Insurance Company, 164 Washington 320:

> "The agreement of the parties was that the failure to give the notice required by this certificate should invalidate all claim under it and there can be no question but that the serving of this notice was a condition precedent to the enforcement of any such claim."

Wilcox vs. Massachusetts Protective Assoc., 165 N. E. 429:

> "The plaintiff must fail in this action unless the notice required by the policy was given."

2. The Court should have denied the introduction of Exhibits C and D. Specifications 5 and 6.

The defendant's objection to these exhibits was that they were incompetent, irrelevant and immaterial and tended in no way to prove any allegation alleged in the plaintiff's complaint. The allegation is that the notice required in the policy was given of the death of the deceased and that claim would probably be made and Exhibit C is dated July 8, 1942; Exhibit D July 30, 1942, and under the interrogatories introduced in evidence appellant admitted that it was received by it in the form of a letter which is dated and mailed July 8, 1942, the deceased having departed this life on June 30, 1942.

The question is was the notice sufficient as provided by Paragraph D4 above quoted.

A reading of the notice Exhibit C dated July 8, 1942, advises that Augustus S. Heatfield died. That is the end of that story. It nowhere states by or through accidental means nor any inference as to his death being accidental.

Thompson vs. United States Casualty Company, 6 N. E. 2nd 769:

> "But notice of death alone is not sufficient. The policy is not a life insurance policy. It insures against death resulting from accident and notice which is expressly required is notice of accidental death. At least the notice must be such as under the existing circumstances will by fair construction inform the company that the insured has met death through accident."

Barnett vs. John Hancock Mutual Life Insurance Co., 126 A.L.R. 608:

> "The purpose of proof is to apprise the defendant that a death has occurred under such circumstances that the indemnity has become payable."

City Bank Farmers Trust Co. vs. Equitable Life Assurance Co., 285 N. Y. S. 250:

> "The claimant's affidavit merely states further in each case that death was caused by carbon monoxide gas — which merely submitted proof without alleging any fact from which it could be inferred it was accidental."

Wachel vs. Equitable Life Assurance, 194 N. E. 850. The beneficiary before bringing suit served upon each insurance company notice and proof of death of assured. Only in the proof served upon the Travelers Insurance Company is there any allegation or suggestion that death was due to accident to the left leg in the early part of July, 1930. The notice gave

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the cause of death as coronary thrombosis.

The Court said:

> "Coronary thrombosis is concededly a disease thus the proofs of death are not sufficient to show death was caused exclusively by accidental means but showed affirmatively that death was due to disease.
>
> Proof of death by accident is a condition precedent to liability by double indemnity and under the proofs the plaintiff was required to show performance of this condition."

The Court of Appeals of New York held the beneficiary could not recover, reversing the appeal division.

Commercial Casualty Company vs. Stimson, 111 Federal 2nd p. 63. At p. 68 the Circuit Court of Appeals said:

> "Some proof of death, due to accidental causes was all that was required."

3. The Court erred in admitting the testimony over defendant's objection of Floy Harrington and Thomas Callam and Thomas Heatfield covered by specifications 7, 10 and 11.

(11) The Court admitted the testimony of Floy Harrington and Thomas Callam as being part of the res gestae. It being statements of the deceased in which he said to Floy Harrington, that he had an

awful pain and I never had pain in my heart before. He said it was so hot and he got so tired and exhausted he had to lie down. He said he had been there two hours and that he had to lie down an hour. After Floy Harrington had been with him twenty minutes, he drove his own car a distance of approximately three miles and said to Thomas Callam in which he remarked he had overexerted himself.

The statements have no reference to any main event nor attempting to explain one nor have reference to anything explanatory of what he did and they are no proof of anything excepting he was tired and exhausted by reason of it being a very hot day and are inadmissible for any purpose.

Jones, on Law of Evidence, Section 360. Speaking of declarations as being admissible, the writer says:

> "If they are spontaneous and tend to explain the transaction and if so slight an interval of time has elapsed as to render premeditations impossible."

Henry vs. Seattle Electric Co., 55 Wash. 447. A street car and a wagon collided. The street car continued on its run and returned in about 30 to 45 minutes. When asked what the conductor said he testified:

"He got off the car and he come over to me and he says: 'Were you hurt?' I says, 'I was not.' He says, 'You come out lucky.' I told him I thought I did. He says, 'This motorman is green at the business'."

The Court at 448:

"In order to be a part of the res gestae, the subsequent declaration must explain or in some way characterize the main fact. It must not be the narration of a past event, nor the expression of an opinion. In the evidence before us, the words of the conductor did not form part of the main transaction; nor did they in any manner qualify or explain any act of the driver of the wagon, or the employees of respondent at the time of the happening of the accident. It was nothing more than an expression of an opinion which was in no sense competent, and was properly stricken."

Yarbrough vs. Prudential Insurance Co. of America, 99 Fed. 2nd, 874:

"Res gestae must spring from the main fact; it presupposes a main fact and it means the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. 'One peculiarity of the main fact or transaction ought to be noted, and that is that it is not necessarily limited as to time—it may be a length of time in the action. The time of course depends on the character of the transaction'."

Chesapeake & O. Ry. Co. vs. Mears, 64 Fed. 2nd, 291:

"To render them admissible what is required is: (1) There be some shock to the feelings sufficient to render the utterance spontaneous and unreflecting; (2) 'the utterance must have been before there has been time to contrive and misrepresent, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance'; and (3) it must relate to the circumstance causing the shock to the feelings."

Bonner vs. Texas Co. 89 Fed 2nd, 291:

"The general rule that statements by a person not under oath and not subject to cross-examination, although he be since deceased, are not to be received in evidence, we recently examined along with the established exception touching res gestae in Halleck vs. Hartford Accident & Indemnity Co. (C. C. A.), 75 F. (2nd) 800, a case from Texas, and what was there said need not be repeated. It does not well appear here that the transaction of the explosion was still on foot, speaking through this man in exclamatory or at spontaneous words. Though suffering, the declarant was far in time and space from the explosion, and had been with several persons so that a spontaneous impulse to speak could have expended itself. He was calm, and solicitous for his wife, thus talking not of his relationships to life. What he said about the explosion was not spontaneous, but in response to questions put to him. The words 'They have gotten me this time' seem to show an effort to place the blame of the occurrence, though possibly he was referring only to the machines. We think the court was well justified in treating this as a narrative of past events, and thus not res gestae but hearsay."

Field vs. The North Coast Transportation Co., 164 Wn. 123. While the stage driver was on the stand, plaintiff's counsel asked the following question:

> "Q. Let us ask you whether or not immediately following the accident a gentleman came up to you and expressed himself very critically to you about the way that you were driving, the manner you were driving on the pavement."

After objection, the court admitted it as part of the res gestae and the witness' answer was "He did."

The Supreme Court of Washington said at p. 127:

> "Was the gentleman's expression admissible under the res gestae rule? It is argued by counsel for Field that it was, because of its near coincidence in time and place with the occurrence of the accident. Let us concede that the expression was sufficiently near in time and place to come within the res gestae rule, and also sufficiently spontaneous; still, to our minds that does not necessarily render it admissible under the res gestae rule. The inquiry still remains: Did the gentleman's expression contain any statement of any fact provable by any such spontaneous expression?
>
> It clearly was not proven to be any expression of a fact. All we can possibly make of it is that the gentleman seemed to be of the opinion that the stage was being carelessly driven. Such an expression is far different from a witness' spontaneous saying, under the dominating promptings of an occasion, 'The brakeman kicked me off the train,' as in Dixon v. Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943, 107 Am. St. 810, 68 L.R.A. 895; 'The conductor kicked me off the

> car' and 'The boy is off,' as in Britton v. Washington Water Power Co., 59 Wash. 440, 110 Pac. 20, 33 L.R.A. (N.S.) 100; 'My! Art, that car is coming fast,' and 'I am in no hurry,' as in Heg v. Mullen, 115 Wash. 252, 197 Pac. 51; and 'I was operating the car at about twenty-five or twenty-eight miles an hour,' as in Lucchesi v. Reynolds, 125 Wash. 352, 216 Pac. 12. These were each an expression stating a specific fact and not a mere statement of opinion or feeling upon the part of the one making it."
>
> *Beck vs. Dye,* 200 Wn. 1.

The lower court over defendant's objection as part of the res gestae permitted the witness to be asked whether he had heard any one at the scene of the accident make any statement as to how it had happened, in the presence of the defendant and he answered:

> "Some of the people said he went through the red light."

This court has had frequent occasion in the past to consider the so-called res gestae rule with respect to the admission of testimony concerning statements made by participants in a transaction or by other persons present thereat. We have taken the pains to examine the cases on the subject as listed in the *Washington Digest Annotated,* topic "Evidence," key numbers 118 to 128 inclusive; we make this reference only because the cases are too numerous to set forth by specific citation in this opinion.

A careful examination of those cases, read chronologically and as a whole, will reveal that the rule as adopted, declared, and followed by this court requires that the statement or declaration concerning which testimony is offered must, in order to make such evidence admissible, possess at least the following essential elements: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made. * * *

The term "res gestae" is not a mere shibboleth

by an indiscriminate use of which every unsworn statement made during a particular transaction or occurrence is to be admitted. It is a doctrine which recognizes that, under certain circumstances, a declaration may be of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event.

Watson vs. A. M. Byers Co., 14 Atlantic 2nd, 201, the Court at p. 203 said:

> "They were not spontaneous utterances accompanying or springing out of the accident or succeeding it so closely in time and place as to be a part of the occurrence and not the narration of a past event but were concerning matters that occurred a considerable time after the accident and were elicited in response to questions and clearly should have been excluded."

Wigmore on Evidence, 3rd Ed., Section 1753, THERE MUST BE A MAIN OR PRINCIPAL ACT.

> "The limitations mentioned for cases under the exceptions that there must be a main or principal act already relevant to the case to which the declaration relates. * * * What is required here is merely that there shall be some startling occurrence calculated to produce nervous excitement and extemporaneous utterances."

Section 1754, DECLARATIONS MUST ELUCIDATE THE ACT.

"There is, however, one aspect in which the limitation becomes a real one for the matter to be elucidated is by hypothesis, this occurrence or act which has led to the utterance and not some distinct and separate and prior matter. Apparently the courts are disposed on one theory or another to enforce this restriction."

IV. The Court erred in submitting the case to the jury whatsoever and in holding that notice was given as provided by the policy within twenty days. (8 and 9.)

Hanley vs. Occidental Life Insurance Co., 164 Wn. 320;

Wilcox vs. Massachusetts Protective Assoc., 165 N. E. 429;

Thompson vs. United States Casualty Co., 6 N. E. 2nd, 769;

Barnett vs. John Hancock Mutual Life Insurance Co., 126 A. L. R. 608;

City Bank Farmers Trust Co. vs. Equitable Life Assurance Co., 285 N. Y. S. 250;

Wachtel vs. Equitable Life Assurance, 194 N. E. 850;

Commercial Casualty Company vs. Stimson, 111 Fed. 2nd, 63.

V. The Court erred in admitting testimony of

Drs. Myhre and Snyder there being no foundation upon which it could be based or admitted.

VI. The Court erred in denying the appellant's motion to dismiss the action.

Hanley vs. Occidental Life Insurance Co., 164 Wn. 320;

Wilcox vs. Massachusetts Protective Assoc., 165 N. E. 429;

Thompson vs. United States Casualty Co., 6 N. E. 2nd, 769;

Barnett vs. John Hancock Mutual Life Insurance Co., 126 A. L. R. 608;

City Bank Farmers Trust Co. vs. Equitable Life Assurance Co., 285 N. Y. S. 250;

Wachtel vs. Equitable Life Assurance, 194 N. E. 850;

Commercial Casualty Co. vs. Stimson, 111 Fed. 2nd, 63.

ARGUMENT

After both parties had rested, the defendant at R. 218 moved the court to dismiss the action and to render judgment for the defendant for the following reasons:

(1) That no notice of any claim for accident was given by the plaintiff within twenty days.

(2) That there was no evidence or inference therefrom that Augustus Heatfield had overexercised, overexerted or in any manner strained himself.

(3) That there was no evidence of death by accidental means.

(4) That the only evidence in the case as to accidental means is based upon the admission of res gestae testimony and that they were statements of conclusions and not statements of facts and under the entire record plaintiff is not entitled to recover.

That in Paragraph V, R. 4, "the allegation of the plaintiff is that death was approximately, and exclusively and independently of all other causes by overexertion and strain."

The evidence is by Ralph Harrington that the decedent had a shovel lying in the back of his car. (R. 52.)

"I don't know what he did at all." (R. 63.)

Floy Harrington testified:

> "Well, as I said he was holding his hands sort of like that and he said, 'I have an awful pain. I have a pain in my heart, the first time in my life I ever had any trouble with my heart.' He said it was so hot and he got so tired and ex-

hausted he had to lie down. (R. 70.) He said he had been there two hours. He said he had laid down an hour, that it was real hot." (R. 72.)

That Mr. Harrington testified that he attached the front bumper to the front bumper of the deceased's car and while the deceased was operating his car, he pulled him out. (R. 60.)

This operation took approximately twenty minutes and the deceased drove three miles to a camp. There he had a conversation with Thomas Callam in which he said that the deceased said he had overexerted himself. (R. 109.)

Thomas Heatfield testified he was the son of the deceased. He said his father was 65 years of age, that he died on June 30, 1942. That he went on July 3, 1942, from Curlew to Orient a distance of 24 miles and on that road he observed a spot where automobile tracks went off the road. (R. 114.) Midway over the 24 miles he met a Mr. Abrahams, that he wrote nothing down, that he had not located the place yet, that he had never seen the road before and then he located the place. (R. 164.) Mr. Abrahams had never seen his father where the automobile went off the road. (R. 177.)

Dr. Myhre testified (R. 131), that from the autopsy you could not tell that the deceased overexerted himself. Dr. Myhre further testified (R. 124) that exer-

tion will not cause coronary stenosis.

Dr. Reid testified for the defendant that exertion could not have caused this man's death whatsoever. (R. 187.)

Dr. Lewis testified that the fact the deceased had been exercising to the extent of overexertion or looked tired, worn out had nothing to do with his death. (R. 205.)

All the testimony appears in the foregoing statements with reference to any overexercise or strain. There is not a witness who testified that they had seen him doing anything whatsoever and from the beginning to the end of this case, there was no ground for any assumption that he had overexerted himself or strained himself and there was positively nothing for the jury. Dr. Snyder testified additionally, that the hypothetical question assumed that he had done a lot of hard work and it was based upon this assumption in that question that he had done considerable overexercising, that the strain must have caused his death.

Then we have another feature. Mrs. Floy Harrington testified definitely that the deceased had been lying down for an hour and when we couple that with the fact that the deceased was an insurance man, he had more than sufficient opportunity to have

deliberated on what he should say when interrogated.

MacGerry vs. Rodgers, 144 Wn. 375, the Supreme Court of Washington states at p. 378:

> "Upon the trial, respondent testified to the break between herself and the appellants, testified that she was ordered from their home and that she went some two or three miles to the office of a doctor whom she had met before, and there sought refuge. The doctor was then called as a witness on her behalf, and testified to respondent's arrival at his office, her mental and physical condition when she arrived, and then, over objection, was permitted to detail all that respondent then told him as to what had occurred between Mrs. Rodgers and herself causing her to leave appellant's home. It is attempted to justify the admission of this evidence upon the ground that it was a part of the res gestae. We cannot so hold. In the time it took to go from the Rodgers home to the doctor's office, there was ample opportunity for respondent to plan how best to appeal to the doctor's sympathy, and her then situation made her absolutely dependent upon the sympathy of some one. The situation was such as to exclude the very basis of the res gestae doctrine, and the testimony referred to was hearsay and prejudicial."

Somogyi vs. Cincinnati, N. O. & T. P. Ry. Co., 101 Fed. 2nd, 480, the Sixth Circuit Court of Appeals said at p. 481:

> "The res gestae rule permits reception of statements substantially contemporaneous with the event if they are explanations of a spontaneous nature arising from the transaction itself before

the declarant has had opportunity for deliberation or reflection."

Aetna Life Insurance Co. vs. Kern-Bauer, 62 Fed. 2nd, 477. In this case one witness who saw Kern stated, "that he did not drink, that he was driving his car and the lights blinded him." The other testified that Kern said the lights blinded him.

The Court went on to say:

> "These statements as to the blinding lights are the only evidence in the record as to the cause of his car running off the road and were admitted over objection."

Tenth Circuit Court of Appeals at p. 479 said:

> "Applying the rule to the case at bar, we are of the opinion that the evidence was inadmissible. The burden is upon the proponent of evidence to show its admissibility. That burden was not carried. If both witnesses were testifying to the same statement, and if it was made as soon as they found him, the record is still silent as to how long a time elapsed, or what transpired, between the time the lights blinded him and his narration of the event. It may have been three minutes or three hours. We do not know that in the interval he ran a block off the pavement, yet stopped his car without damage to it or visible injury to himself, and turned off the ignition. We do know he was able to comprehend a question as to his drinking and give a sensible and exculpatory answer thereto. We do know his spells of pain were recurrent; he was having one when assistance came; then he said he was able to drive his own car to Wichita; half an hour

later, he had another seizure which terminated in his death. Upon this record, he may well have been sitting in his car for hours, between spells, reflecting on many things, including an explanation of the accident. The proof leaves the circumstances in the realm of pure conjecture, and that is not enough."

II. With reference to the admission of Exhibit C. It was essential under the policy Paragraph D4, that the plaintiff or some one in her behalf do two things:

(a) Give notice of accidental death or injury.

(b) With particulars sufficient to identify the insured.

A reading of Exhibit C must disclose to Your Honor that there is positively no reference therein whatsoever to any accident occurring. It merely says the following: "Augustus S. Heatfield, the assured, died near Curlew, Washington, on June 30, 1942. He held an accident policy with the Illinois Central Men's Association and the Aetna Life Insurance Co. I was employed by the executor and the widow to represent them in the holding of the estate and in the matter of collecting on the accident policies." What policies? The two previously named. "I learned today that Mr. Heatfield had a policy with the Standard Accident Insurance Company as above numbered, therefore I must advise you that there will probably be a claim made under this accident policy."

Merely stating to the insurer that this man held a policy in their company most certainly did not advise them that an accident had transpired. Saying that a claim would be made under an accident policy does not advise them that an accident has transpired. If it is so interpreted, all the insured or the beneficiary need to do is to say: "John Smith holds a policy in your company and claim will be made thereunder." What would the insurer know? Positively nothing. Now let us add the words "accident policy" to the above statement and what would the insurer know or let us make it a life policy and what would the insurer know? It would simply know that a policy was held and some character of a claim would eventually be made.

It was the duty of the beneficiary to advise the company that an accident caused the death of Augustus S. Heatfield. There was no statement in Exhibit C that his death was caused by accident, that he was injured in any manner by accident or that any accident had transpired and it was their duty to furnish some notice within twenty days.

Moran Bros. vs. Pacific Coast Casualty Co., 48 Wn. 592:

> "This policy provides the assured, upon the occurrence of an accident shall give immediate written notice thereof * * * to the home office

of its company or to its duly authorized agent in the locality in which this policy is issued."

The Court in interpreting the meaning of this notice at p. 596 said:

"We think the essential object of this report is to give the company notice, and notice at once, of the character of the injury and the probability of liability, and it is not intended that any mistake which the employer might make in giving his version of the facts would render the policy ineffectual."

Hanley vs. Occidental Life Insurance Co., 164 Wn. 320;

Thompson vs. United States Casualty Co., 6 N. E. 2nd, 769;

City Bank Farmers Trust Co. vs. Equitable Life Assurance Co., 285 N. Y. S. 250;

Wachtel vs. Equitable Life Assurance, 194 N. E. 850.

Respectfully submitted,

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